

ALJ/DOT/hkr

DRAFT

Agenda ID #2342

Adjudicatory

7/10/2003

Item 3

Decision **DRAFT DECISION OF ALJ DUDA** (Mailed 6/3/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CALIFORNIA ISP ASSOCIATION, INC.,

Complainant,

vs.

PACIFIC BELL TELEPHONE COMPANY
(U 1001 C); SBC ADVANCED SOLUTIONS,
INC. (U 6346 C) and DOES 1-20,

Defendants.

Case 01-07-027
(Filed July 26, 2001)

**OPINION APPROVING REVISED SETTLEMENT
AGREEMENT WITH MODIFICATIONS**

TABLE OF CONTENTS

Title	Page
OPINION APPROVING REVISED SETTLEMENT AGREEMENT WITH MODIFICATIONS	2
I. Summary	2
II. Background of Complaint.....	2
III. Settlement Agreement.....	6
A. Initial Settlement Agreement	6
B. Revised Settlement Agreement	9
IV. Discussion	11
A. Modifications to the Revised Settlement.....	14
B. Other Parties' Concerns.....	18
C. Conclusion.....	21
V. Comments on Draft Decision	22
VI. Categorization and Assignment of Proceeding	26
Findings of Fact	26
Conclusions of Law	27
ORDER.....	28
Appendix A: Proposed Modifications to Revised Settlement Agreement Revised Release and Settlement Agreement	
Appendix B: Ruling	

**OPINION APPROVING REVISED SETTLEMENT
AGREEMENT WITH MODIFICATIONS**

I. Summary

This decision approves a settlement agreement entered into between the California Internet Service Provider Association (CISPA, or Complainant), Pacific Bell Telephone Company (Pacific, also known as SBC) and SBC Advanced Solutions Inc. (ASI) (jointly SBC/ASI, or Defendants), conditioned upon CISPA, SBC, and ASI agreeing to modify the settlement agreement as described in this order. Specifically, the settlement should be revised to: 1) remove language in Section 1(a) allowing ASI to implement packetized voice on the ISP's end-user line without the consent of the affected ISP; 2) specify an explicit time frame in Section 8(a) regarding the release of claims that were the subject of this complaint; and 3) incorporate further revisions proposed by SBC/ASI on March 10, 2003.¹

II. Background of Complaint

On July 26, 2001, CISPA filed this complaint alleging unlawful discrimination by the Defendants in the provision of Digital Subscriber Line (DSL) Transport services. CISPA alleges anticompetitive marketing and sales practices, preferential treatment in providing DSL to ISP's affiliated with SBC and ASI, improper use of non-public customer information, and service quality concerns such as service interruptions and disconnections. Among the more serious allegations, CISPA charges that SBC/ASI: 1) engaged in "clenching" of

¹ A copy of the Revised Settlement, with revisions that are proposed in this order, is attached as Appendix A. The revisions proposed in this order are shown in bold underline for additions, and strikeout for deletions.

customers by unreasonably disconnecting the DSL Transport facilities of end-use customers who desired to change to independent ISPs (i.e., ISPs not-affiliated with SBC/ASI); 2) failed to resolve billing and service disputes with ISPs involving DSL Transport in a timely manner; 3) unreasonably required ISPs to migrate to a new DSL Transport architecture; 4) discriminated against independent ISPs by provisioning DSL Transport services faster to ISPs affiliated with SBC/ASI; and 5) improperly allowed the sales representatives of affiliated ISPs to have access to orders for DSL Transport placed by independent ISPs.

On October 22, 2001, SBC/ASI filed a motion to dismiss the complaint, alleging that the Commission does not have jurisdiction over the DSL Transport services at the heart of the complaint because those services are interstate services within the jurisdiction of the Federal Communications Commission (FCC). In addition, Defendants maintained the complaint should be dismissed as moot given ASI's filing of an interstate tariff with the FCC for DSL Transport service in California. SBC/ASI's motion was denied by the Assigned Commissioner and Administrative Law Judge (ALJ).² In their ruling, the Assigned Commissioner and ALJ found that DSL Transport can involve certain intrastate applications and the Commission has concurrent jurisdiction with the FCC over DSL Transport service. The ruling also denied SBC/ASI's preemption claims, finding instead that there was no clear and manifest congressional intent to preempt all state authority in this area, particularly with regard to safeguarding the rights of consumers. Specifically, the ruling found that Section 253(b) of the Telecommunications Act of 1996 (the Act) does not affect the

² See *Assigned Commissioner's and ALJ's Ruling Denying Defendants' Motion to Dismiss*, March 28, 2002.

ability of the state to impose requirements to safeguard the rights of consumers, and Section 414 of the Act is a savings clause that allows states to enforce their own laws as to activities involving interstate communications.³ The ruling concluded that the Commission could consider CISPAs complaint alleging violations of California public utility law and Commission orders in order to examine claims of fraudulent or misleading conduct by SBC/ASI and poor DSL Transport service quality. The ruling also clarified that the scope of the complaint “should not include the reasonableness of DSL rates, operating speeds and the like set forth in the federal tariff”⁴ Today’s decision affirms this ruling on the motion to dismiss.⁵

Following this ruling, a scoping memo for the case was issued on May 10, 2002, and complainant’s testimony was served on June 14, 2002 in preparation for hearings scheduled for September 2002.

On August 12, 2002, CISPAs and SBC/ASI jointly filed a motion to withdraw the complaint and dismiss the proceeding with prejudice because they had reached a settlement (Settlement Agreement) resolving their disputes. A copy of the signed Settlement Agreement was filed as an attachment to the motion.

Shortly thereafter, Brand X Internet LLC (Brand X), The Utility Reform Network (TURN), and the Utility Consumers’ Action Network (UCAN) filed motions to intervene as parties in this proceeding. Brand X is a local Internet

³ *Id.*, p. 8. *See also* 47 U.S.C. 253(b) and 47 U.S.C. 414.

⁴ *Id.*, p. 11.

⁵ The ruling is attached to this order as Appendix B.

Service Provider (ISP) in Southern California that offers Internet connections to residential customers, businesses, and non-profit organizations. TURN/UCAN's joint motion to intervene stated their intent to represent consumer and small business interests and to ensure competitive choices in Internet service in California.

The Assigned Commissioner and ALJ granted these motions to intervene on a limited basis and for the sole purpose of commenting on the Settlement Agreement.⁶ In the same ruling, the Assigned Commissioner and ALJ denied CISPA and SBC/ASI's joint motion to withdraw the complaint and ruled that the Commission would review the Settlement Agreement under Rule 51.1(e) of the Commission's Rules of Practice and Procedure (Rules) because the commenters had raised several issues relating to the public interest that the Commission should consider. The ruling ordered CISPA, SBC and ASI (collectively "the Settling Parties") to hold an additional settlement conference to address the concerns raised by TURN/UCAN and Brand X. The ruling directed the Settling Parties to file a report on the settlement conference, and any modifications to the settlement arising from that settlement conference.

In January 2003, Raw Bandwidth Communications (Raw Bandwidth), a customer of SBC/ASI's DSL transport services, petitioned for and was granted intervention as a party to the proceeding for the limited purpose of commenting on the Settlement Agreement.

Following the additional settlement conference ordered by the Assigned Commissioner and ALJ, the Settling Parties filed a revised settlement agreement

⁶ See *Assigned Commissioner's and ALJ's Ruling Granting Intervention Requests and Denying Motion to Withdraw Complaint*, December 17, 2002 (December 2002 Ruling).

on February 10, 2003.⁷ Brand X, Raw Bandwidth, and TURN/UCAN filed comments on the revised settlement on February 20, 2003. SBC/ASI responded to these comments on March 10, 2003.

III. Settlement Agreement

A. Initial Settlement Agreement

In the initial Settlement Agreement filed on August 12, 2002, the Settling Parties state they have reached a settlement that is more advantageous than proceeding with litigation because it resolves their dispute and serves the interest of ISPs and Californians who want to use DSL service in areas served by ASI. The Settlement Agreement contains provisions addressing: 1) system architecture; 2) the interval for switching customers using DSL Transport from one ISP to another (also known as “customer migration interval”); 3) the provisioning of DSL Transport service to ISPs; 4) access to competitively sensitive ISP ordering information; 5) sales practices of ASI and Pacific personnel; 6) creation of an ombudsperson to report and resolve billing and sales practice disputes between ISPs and SBC/ASI; 7) creation of a marketing fund to promote ASI’s DSL services through non-affiliated ISPs; and 8) monetary compensation to independent ISPs to reimburse certain billing expenses. The Agreement also addresses payment of attorneys’ fees to CISPAA and a provision

⁷ The Settling Parties initially filed their settlement report and revised settlement on February 7, 2003. Other parties immediately objected that the report contained confidential statements made by the parties during the settlement conference. On February 10, the Settling Parties moved to withdraw the February 7 filing and substitute it with a revised Settlement Report which removed the controversial language. The motion to withdraw the February 7 filing and replace it with the February 10 revised settlement report was granted by the ALJ via electronic mail on February 13, 2003.

prohibiting CISPAs' involvement in any state or federal proceedings under Section 271 of the Act,⁸ or state proceedings under Pub. Util. Code § 851 regarding claims based on the facts alleged in the complaint.

According to the Settling Parties, the Settlement resolves their dispute, solidifies various remedies regarding DSL service to ISPs that Pacific/ASI have already implemented during the course of this litigation, commits Pacific/ASI to continued improvement, provides resources to CISPAs members who sell ASI's DSL service, and ensures CISPAs does not suffer a hardship based on the attorneys' fees it incurred in the course of this litigation. They contend the Settlement is in the public interest because it will ultimately benefit California consumers who have or seek DSL Internet service. Specifically, they contend the Settlement benefits consumers by minimizing the time involved in changing from one ISP to another, which will allow consumers to exercise choice in ISP providers without significant downtime. In addition, they assert the Settlement assists independent ISPs in marketing DSL, which should give consumers a wider variety of ISPs to choose from for their broadband services. The Settling Parties believe that the provision limiting CISPAs' future involvement in other Commission proceedings regarding the facts alleged in this complaint is a fair trade for other provisions of the Settlement.

In response to the proposed Settlement, several parties filed comments opposing the withdrawal of the complaint and stating that the Settlement is not

⁸ This generally refers to the Commission's review of SBC's application to provide long-distance services in California (R.93-04-003/I.93-04-002/R.95-04-043/I.95-04-044, "Section 271 Proceeding").

in the public interest as required by Rule 51.1.⁹ Brand X and TURN/UCAN each filed comments contending that the settlement is not in the public interest because it limits CISPA's involvement in other Commission proceedings¹⁰ and it does not meaningfully resolve the issues presented in the complaint. According to these parties, the Settlement does not give ISPs any enforceable rights to counter the alleged improper actions of SBC/ASI or prevent future recurrence of these alleged abuses.

In their December 2002 ruling, the ALJ and Assigned Commissioner determined that the proposed Settlement should be reviewed under the public interest standard contained in Rule 51.1.¹¹ The ruling went on to note concerns over particular language in the Settlement pertaining to limitations on the ability of other entities to pursue future claims against SBC or ASI.¹² Specifically, the ruling expressed concern that Section 9 of the Settlement, entitled "Settlement Agreement; Release of Claims," was vague and ambiguous and might be used by Defendants to counter future claims of alleged wrongful conduct as violations of

⁹ Rule 51.1(e) states:

The Commission will not approve stipulations or settlements, whether contested or uncontested, unless the stipulation or settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

¹⁰ See Rule 51.1(a) regarding stipulations and settlements that states in relevant part:

Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.

¹¹ December 2002 Ruling, p. 13.

¹² *Id.*, p. 14.

the Settlement. In addition, the ruling articulated concerns with a provision limiting CISPA's participation in SBC's Section 271 and various Section 851 proceedings. Finally, the ruling questioned the language in the Settlement limiting CISPA's ability to provide information in future Commission proceedings. As the ruling stated:

It is unclear how such a broad restriction as contained in paragraph 9(a) will be practically enforced. The settlement refers to the "facts" underlying the complaint, but we are unsure what this refers to since the record for the case was not developed. We are concerned this language might unreasonably exclude any future claims of misconduct against Pacific or ASI unless the facts, time periods, and claims referred to are specified. (*Id.*, p. 15.)

The ruling directed the parties to hold an additional settlement conference to consider addressing the parties' concerns and report whether any revisions to the Settlement were made in response.

B. Revised Settlement Agreement

In response to this directive, the Settling Parties held a settlement conference in January 2003 and subsequently filed a revised settlement agreement on February 10, 2003 (Revised Settlement). According to the Settling Parties, the Revised Settlement contains revisions to address the concerns raised in the December 2002 ruling and by the parties in their comments on the initial settlement.

With regard to the concerns expressed by the Assigned Commissioner and ALJ, the Settling Parties revised language in the settlement regarding release of future claims. The Revised Settlement now ties the release of claims to the

issues contained in the May 10, 2002 Scoping Memo issued in this proceeding.¹³ The Revised Settlement also deletes language restricting CISPA's participation in the Section 271 proceeding or any Section 851 proceedings, and it makes clear that parties are not prevented from complying with legal obligations to provide information to the Commission or to a third party in future proceedings.¹⁴

In response to other criticisms of the initial settlement, the Revised Settlement contains other modifications including:

- Customer Migration Interval—Recent historic experience has been that subscribers can experience from 7-9 days of downtime in the migration from one ISP to another. Section 7 of the Revised Settlement commits ASI to system enhancements by the end of the third quarter of 2003 that will reduce subscriber downtime to a maximum of one business day if certain conditions are met, and no more than 2-4 days of downtime in other circumstances.
- Ordering Interface—Section 5 of the Revised Settlement sets forth a series of specific dates for completion and availability of a series of enhancements to the ASI service order process that the Settling Parties contend will benefit ISPs.
- Billing—Section 3 of the Revised Settlement clarifies aspects of the Ombudsperson role that was created to reconcile unresolved ISP billing issues and allegations of improper sales practices. The Ombudsperson will report to a high level position in the ISP sales organization, will have full authority to promptly resolve issues; and SBC will retain records of each inquiry under this process.

¹³ See Section 8(a) of the Revised Settlement.

¹⁴ *Id.*

Despite these revisions to the initial settlement, Raw Bandwidth, Brand X, and TURN/UCAN filed comments opposing the Revised Settlement. SBC/ASI responded to this opposition with additional revisions that it is willing to make to the settlement regarding the customer migration interval and grandfathering of certain services.¹⁵ In response to Raw Bandwidth, SBC/ASI also provided a letter indicating that it is reinstating its web page listing independent ISPs.

IV. Discussion

This is a contested settlement that the Commission will review according to the standard set forth in Rule 51.1(e), which requires that a settlement be reasonable in light of the whole record, consistent with law, and in the public interest. Overall, we find that the Revised Settlement meets that standard as long as certain modifications are made and agreed to by the parties, in accordance with Rule 51.7, as described in below.

The Revised Settlement is reasonable in light of the whole record because it addresses several of the allegations contained in the initial complaint and provides remedies related to those alleged potentially anticompetitive and discriminatory practices of SBC/ASI. Specifically, the Revised Settlement addresses the allegations in the original complaint as follows:

- Anticompetitive marketing and sales practices—These allegations are addressed through provisions relating to monitoring of standards for marketing scripts (Section 6);

¹⁵ See SBC/ASI Reply Comments, March 10, 2003. CISPA, as the other settling party, did not join in these revisions but indicated that it would comment on whether it agreed with these revisions either at a hearing on the settlement or in comments on a draft decision.

protection of end user information through system security enhancements that limit SBC service representatives to DSL Transport order information from only its affiliated ISP (Section 4); creation of an ombudsperson to resolve sales practice and billing disputes with ISPs (Section 3); commitment of SBC/ASI to independent third party review of the process and procedures associated with access and use of ISP customer information (Section 6).

- Preferential treatment in providing DSL to ISPs affiliated with SBC and ASI—This allegation is addressed through improved customer migration intervals (Section 7); ordering interface improvements (Section 5); independent third party review of access to and use of ISP end user information (Section 6); and creation of an ombudsperson (Section 3).
- Improper use of non-public customer information—This allegation is addressed through sections of the settlement regarding system security enhancements for partitioning of customer information (Section 4); independent third party review of the access to and use of ISP end user information (Section 6); and creation of an ombudsperson (Section 3).
- Service quality concerns such as service interruptions, disconnections, and “clenching” of customers—These allegations are addressed through improvements to the customer migration interval (Section 7) and order provisioning process (Section 5).
- Requiring ISPs to migrate to a new DSL Transport architecture—This allegation is addressed in a provision requiring consent of an ISP prior to network architecture changes (Section 1).

In addition, the Revised Settlement contains other provisions that are reasonable in light of the allegations in the complaint such as the grandfathering of certain service options (Section 1(b)), and the creation of a marketing fund of \$725,000 for the benefit of CISPA’s ISP members engaged in promoting ASI’s DSL Transport service with their ISP service (Section 14(b)(2)).

The Revised Settlement is consistent with law, particularly since it has been modified to remove language contained in the initial settlement that restricted CISPA's involvement in other Commission proceedings and it has clarified and narrowed language restricting the Settling Parties' use of facts underlying this case in other actions (Section 8). Further, the Release of Claims language in the Revised Settlement applies only to the signatories of the settlement, namely CISPA, SBC and ASI. The Revised Settlement does not restrict the ability of third parties that are not signatories to this settlement from pursuing their own, independent claims. According to CISPA:

The Settlement Agreement was executed by CISPA and CISPA alone. The terms of the Settlement Agreement do not prevent any ISP (whether a CISPA member or not) or any consumer group or end use customer from raising whatever issues they want before the Commission, other regulatory venues or in civil courts. (CISPA response, 9/25/02, p. 3.)

Therefore, ISPs, consumer groups, and end-use customers are free to pursue any claims that may have been the subject of this complaint.

The Revised Settlement is in the public interest, if it is modified to address three concerns, which we describe in further detail in Section IV.A below. On the whole, we find the Revised Settlement in the public interest because it resolves the majority of the issues raised in the underlying complaint and improves upon various aspects of the provisioning of DSL Transport service to ISPs, without the need for extensive litigation.

The Settlement has been revised and improved by the Settling Parties, in response to guidance from the Assigned Commissioner and ALJ. Specifically, language limiting future claims has been narrowed. In addition, the Revised Settlement contains significant improvements in customer migration intervals

over those in effect at the time the complaint was filed. In the latest revisions, SBC/ASI commit to working toward or achieving a migration interval of one business day in all three scenarios described in the settlement by the fourth Quarter of 2003, or sooner. While some parties criticize the Revised Settlement as merely describing targets for migration intervals in some circumstances, SBC/ASI commit to reporting on their progress and will ultimately bear the burden of explaining to the Commission if these targets are not achieved. Finally, the Revised Settlement specifies actions that SBC and/or ASI will take in response to allegations of anticompetitive practices, preferential treatment of its affiliated ISP, and misuse of independent ISP end-use customer information. While the Revised Settlement has undoubtedly not satisfied all concerns that have been voiced surrounding SBC/ASI's DSL Transport services, it reasonably resolves the competitive concerns raised in this specific complaint in an effort to preserve choice of ISPs for end-use customers. Significantly, the Revised Settlement does not foreclose future claims by DSL Transport customers who are not signatories to this settlement.

A. Modifications to the Revised Settlement

Nevertheless, in order for the Commission to make a final finding that the Revised Settlement is in the public interest, it must be modified in three ways.¹⁶ First, we are concerned with language inserted into Section 1(a) of the latest version of the Settlement regarding "packetized voice" which states that:

ASI agrees it shall not, without first obtaining the written consent of any affected ISP: . . . (ii) implement multiple, simultaneous

¹⁶ All of the suggested changes discussed in this section are shown in Appendix A to this order in bold/underline for additions and strikeout for deletions.

sessions (*other than packetized voice*) and bandwidth or quality of service on demand capabilities on the ISP's end user line; . . . (*new language in italics*)

TURN/UCAN, Brand X, and Raw Bandwidth expressed unanimous concern with this new language that allows SBC/ASI to provision packetized voice (apparently for Voice over DSL, or "VoDSL") over the same loop that the ISP has purchased for DSL Transport. With the insertion of these four words in Section 1(a) of the Revised Settlement, SBC/ASI would be able to use the loop for packetized voice without the prior written consent of the affected ISP. Essentially, TURN/UCAN, Brand X, and Raw Bandwidth are concerned that SBC/ASI would reduce the DSL bandwidth provisioned to DSL Transport customers to make space for its own VoDSL services. These parties are concerned that this provision of the settlement could create an unintended approval of such use of the loop.

SBC/ASI respond that if the ISP chooses not to purchase the full capability or speed of the line, ASI remains free to use the portion of the line not purchased for other purposes, such as packetized voice. SBC/ASI state, "Given that VoDSL has not been implemented yet, this is not the proper forum for resolution of the issue of who owns what portion of the bandwidth. When and if that dispute actually arises, the question will be addressed." (SBC/ASI Reply Comments, 3/10/03, p. 12.)

We note that the new text regarding packetized voice was not contained in the initial version of the Settlement filed in August 2002. Although the initial settlement described an exception for SBC/ASI to provide voice service over a DSL line, it was not clear that this related to VoDSL rather than the customary line sharing arrangement of voice and data over one phone line. Indeed, when this complaint was first filed, allegations concerning packetized voice and

VoDSL were not included and they are not mentioned in the scoping memo.¹⁷ The February 2003 Revised Settlement now carves out an exception to this initial agreement and allows SBC/ASI to use the ISP's end user line for packetized voice without the prior approval of the ISP.

From the comments filed, this new and contested language raises substantial technical issues concerning ownership of the line and reservation of part of the line by SBC/ASI for their own purposes. It is somewhat troubling that the mere insertion of four words in the latest version of the settlement raises so many critical questions, and it would be inappropriate for the Commission to adopt the settlement without examining or understanding the ramifications of these technical issues. It is not in the public interest for the Commission to give tacit approval through this settlement to a new technical arrangement that it has not had the opportunity to review and which was not raised as part of the initial complaint. SBC/ASI admit that issues surrounding packetized voice and VoDSL are not appropriate to be raised in this docket but should be considered elsewhere. The comments of the various parties suggest that hearings would be necessary to resolve the factual disputes surrounding VoDSL, such as, but not limited to, use of bandwidth and service quality. We will not hold up resolution of this complaint and the positive aspects of the settlement—such as the improved customer migration intervals, sales practice and order provisioning improvements, and the marketing fund—so that the Commission can analyze or

¹⁷ The initial complaint did raise the issue of SBC/ASI using a portion of an ISP's DSL line to market advanced services, thereby potentially displacing the ISP's bandwidth. (See C.01-07-027, July 25, 2001, pp. 18-19.) This issue was not included in the scope of the case after SBC/ASI discontinued use of the DSL Transport Contract after filing an interstate tariff with the FCC for DSL Transport Service.

hold hearings on an entirely new technical issue which is outside the scope of the original complaint. The Settling Parties should remove this newly inserted language from the Revised Settlement so that the Commission can find the Revised Settlement in the public interest. We highlight that this modification should not be construed to reach a conclusion one way or the other on whether SBC/ASI can offer packetized voice service over an ISP end user's line or whether SBC/ASI must obtain ISP approval to use any portion of the line not paid for by the ISP.

Second, we are concerned that the portion of the Revised Settlement dealing with the release of future claims is still too broad. The initial settlement contained language restricting CISPAC and SBC/ASI from any involvement in a future claim, lawsuit, complaint or administrative proceeding against the other "arising out of or based upon, any and all facts which are the basis of the Complaint or claims asserted in this litigation . . ." (Initial Settlement, 8/12/02, paragraph 9(a).) The Assigned Commissioner and ALJ expressed concern with this language in their December 2002 ruling, noting that it was unclear how such a broad restriction could be practically enforced given that the record of the case and the facts underlying it had not been developed. They suggested that this language "might unreasonably exclude any future claims of misconduct against Pacific or ASI unless the facts, *time periods*, and claims referred to are specified. (December 2002 ruling, p. 15, emphasis added.)

The settling parties responded with revisions to this language that narrowed the restriction on future claims to the facts contained in the scoping memo of this complaint. While this is certainly an improvement, the language still does not specify a time period for these allegations. The public interest will not be served if we approve a settlement that prohibits CISPAC's involvement in

complaint proceedings or lawsuits against SBC and/or ASI with regard to activities that may have been described in the scoping memo of this proceeding, but occur in the future. Instead, it is reasonable to limit the release of future claims by CISP and Defendants to the facts described in the scoping memo that are alleged to have occurred between the date when ASI received operating authority from the Commission in Decision (D.) 00-05-021, or May 4, 2000, and the date of the Initial Settlement, or August 12, 2002.¹⁸ The Settling Parties should modify the settlement accordingly to include this narrower time frame for limitations on future claims in order for us to find the Revised Settlement is in the public interest.

Third, the Revised Settlement should be modified to incorporate the changes proposed by SBC/ASI in their March 10, 2003 comments. Most notably, these changes shorten the customer migration intervals that SBC/ASI commit to, and clarify that the grandfathering of certain services in the Revised Settlement will remain in effect even when ISPs request certain line changes.

B. Other Parties' Concerns

Before concluding, we will address other parties' criticisms of the Revised Settlement. Overall, we are not persuaded by requests to reject the settlement or hold hearings on the underlying allegations contained in the original complaint. TURN/UCAN comment that although the settlement has been revised to address their original objections, the Revised Settlement is not in the public interest because it does not adequately resolve the allegations raised

¹⁸ The Settling Parties may agree to alternative dates for a narrowing of the release of claims and should justify any alternative dates when they advise the Commission whether they accept the modifications in this order.

by CISPA regarding the anticompetitive and service quality concerns of ISPs and their customers. They argue that the Commission must hold evidentiary hearings in order to determine whether the settlement is indeed in the public interest. Specifically, TURN/UCAN suggest that the Commission hold hearings on testimony relating to specific ISP customer complaints, such as claims that customers of independent ISPs had difficulty securing ports for DSL Transport service and that these customers had difficulty switching to independent ISPs.

Raw Bandwidth and Brand X request rejection of the Revised Settlement and hearings on the underlying allegations of the complaint. They express concern with grandfathering provisions of the settlement, customer migration intervals, and whether the settlement contains enforceable rights for ISPs to protect against future anticompetitive conduct. They contend that the Revised Settlement is not a reasonable resolution of the allegations in the initial complaint and therefore not in the public interest because it only addresses a subset of the original allegations. Raw Bandwidth claims that SBC's cancellation of the Internet Access Services Program (IASP), which provided financial and other benefits to ISPs who sell ASI's DSL Transport, and SBC's cancellation of its web page listing of independent ISPs who provide DSL services, shows continued actions by Defendants to disadvantage independent ISPs. Brand X is chiefly concerned with language regarding VoDSL and modem kits, and it finds the \$725,000 marketing fund to be inadequate.

SBC/ASI respond that it is not reasonable to force the parties to litigate the entire case through evidentiary hearings in order to determine whether the settlement agreement is in the public interest. This "defeats the very essence of the policy in favor of settlements, which is to encourage parties to promote resolution of matters without hearings . . . " (SBC/ASI Reply Comments,

3/10/03, p. 3.) On the issues raised by TURN/UCAN, SBC/ASI claim these issues are moot because they are outdated concerns or the concerns have been addressed through provisions of the Revised Settlement, such as improvements to the customer migration interval. SBC/ASI maintain that Raw Bandwidth's issues have been addressed through newly proposed revisions or they are not relevant and should be ignored. Specifically, SBC/ASI indicate that the IASP is not relevant to this complaint and SBC has agreed to a website listing of its ISP customers who provide DSL service. As to the issues raised by Brand X, SBC/ASI respond that these concerns are outside the scope of the complaint because they relate to pricing and system architecture.

We have already found the Revised Settlement is in the public interest if modified. Therefore, we will not schedule hearings on the settlement as requested by these parties. First, we agree with SBC/ASI that requiring the complainant to litigate the entire case in order to determine whether the settlement is in the public interest, when that same complainant has resolved their issues through a settlement, is contrary to the Commission's customary settlement process and defeats the very essence of the policy encouraging settlements. Indeed, there would be no incentive for parties to settle a case if they did not escape the resource burdens and uncertainty of the hearing process.

Second, we find there are no material facts requiring a hearing. We agree with SBC/ASI that, by virtue of the improved customer migration interval and order process improvements, the Revised Settlement represents a reasonable compromise of the issues raised in the complaint. Likewise, we find that the Revised Settlement, as modified in Appendix A, either adopts a reasonable compromise regarding Raw Bandwidth's and Brand X's concerns, or these concerns are outside the scope of the complaint. We are satisfied with the

improvements to customer migration intervals and grandfathering of service options contained in the Revised Settlement, if modified as described in this order. The IASP and website issues are beyond the scope of the complaint, as are the bulk of the issues raised by Brand X (such as pricing of modem kits and system architecture issues). We do not find the \$725,000 marketing fund inadequate because this is only one of many benefits provided by the entire Revised Settlement, as we have enumerated above. We see no reason to engage in hearings on this matter when the Complainant has found the settlement addresses its concerns and when the Revised Settlement, if modified as shown in Appendix A, commits the Defendants to service quality improvements. To the extent Raw Bandwidth or Brand X has specific complaints with aspects of SBC/ASI's DSL Transport service, they are free to file their own complaints.

C. Conclusion

In conclusion, we are pleased that CISPA, SBC and ASI were able to come to a mutually agreeable outcome to this complaint without the need for extensive litigation of the underlying dispute. We are also appreciative of the efforts of the intervening parties who have drawn attention to various public interest concerns related to aspects of DSL Transport service. The participation of these parties, and the willingness of the Settling Parties to consider these issues, has led to an improved outcome in this case. For example, the Revised Settlement agreement that we approve today, as long as it is modified, contains commitments to service quality and order processing that are improvements over the conditions when the complaint was first filed. If the Settling Parties agree to the modifications described in this order, SBC/ASI commit to a one-day customer migration interval by the end of 2003 in most circumstances or an explanation why it has not been achieved, third party review of its handling of

ISP customer information, and a process for resolving billing and other disputes with ISPs. We find that these improvements that are achieved through the Revised Settlement are in the public interest because they address concerns over the ability of end-use customers to receive DSL service through the ISP of their choice without unreasonable service interruption. We also appreciate SBC/ASI's offer to reinstate its web page listing independent ISPs. This listing should provide useful information to end use customers.

We approve the Revised Settlement agreement as long as it is modified to remove language regarding packetized voice, narrow the time frame for release of claims, and incorporate the changes suggested by SBC/ASI in their March 10, 2003 filing. Accordingly, if the Settling Parties accept these modifications, they should execute a modified settlement and file it within 10 days of the effective date of this order. If the Settling Parties do not accept these modifications within 10 days, the Revised Settlement shall be deemed rejected. In the event the Revised Settlement is rejected, the Presiding Officer shall set a schedule for hearings on the original complaint and shall convene a prehearing conference in advance of any hearing to determine which issues should be examined at hearing and whether any additional issues, such as but not limited to the provision of packetized voice over DSL, should be included within the scope of the case.

V. Comments on Draft Decision

The Commission mailed the draft decision of the ALJ in this matter to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments and reply comments were filed by CISPA, SBC/ASI, Raw Bandwidth, TURN/UCAN, and Brand X.

The comments generally concerned the issue of VoDSL and the draft order's proposed modification of the Revised Settlement to remove the words

“other than packetized voice.” SBC/ASI and CISP A both comment that those four words should not be removed from the Revised Settlement because the exception created by this phrase allows SBC/ASI to transport digital voice service over the same line that the ISPs use for data, but not on the bandwidth to subscribed to and paid for by the ISPs. They claim that this exception to allow SBC/ASI to provide packetized voice was not meant to intrude on bandwidth purchased by ISPs, but only to allow SBC/ASI to use unutilized and unsubscribed data capacity on the DSL line. Further, they maintain that a form of this exception was contained in the initial settlement, and then moved to a new section in the Revised Settlement to clarify that any packetized voice could only be transmitted on the bandwidth not subscribed to and paid for by the ISPs. According to the Settling Parties, removal of this exception will limit options available to customers and give ISPs the ability to veto SBC/ASI’s use of unused bandwidth.

TURN/UCAN, Raw Bandwidth, and Brand X all support the draft order’s removal of the exception for packetized voice. TURN/UCAN state that the exception language could permit SBC the freedom to provide VoDSL on an ISP’s line and thereby potentially degrade the service quality of an ISP’s DSL service to its customer. TURN/UCAN urge the Commission to not sanction SBC/ASI’s use of ISP assets for SBC/ASI’s VoDSL service without any compensation to the ISP. They suggest that the Commission hold limited evidentiary hearings to provide a clearer evidentiary basis for deciding the issue. Raw Bandwidth disputes SBC/ASI’s claims that there is any “extra” bandwidth that SBC/ASI can use to provide packetized voice. In addition, Raw Bandwidth questions why SBC apparently cannot provide a competitive local carrier’s voice service combined with a DSL line whereas SBC takes the position here that it should be

able to provide its own voice service in combination with a DSL line provided by an independent ISP. Likewise, Brand X asserts that the language regarding packetized voice, if included in the settlement, would grant SBC/ASI unlimited rights to Internet telephony without public discussion. Brand X questions how SBC/ASI can provide packetized voice over the DSL line without using the ISP's modem and claims that SBC/ASI should not be allowed to use the ISP modem without ISP approval. Brand X provides the following analogy:

[I]magine if we ran competing trucking companies. SBC proposes that we purchase the truck, we pay for the tolls, we pay the gas, we pay the driver, yet they get half the truck to carry their freight for free. And SBC claims exclusive right to carry the most profitable goods. (Brand X Reply Comments, 6/30/03, p. 2.)

Brand X suggests that if SBC/ASI want to provide VoDSL on the ISP's DSL line, they should negotiate with ISPs to buy the rights.

Despite the urging of SBC/ASI and CISPA, we will not reinstate the four words that grant SBC/ASI an exception to use the ISP's end user line to provide packetized voice service. SBC/ASI claim this language was in the initial settlement. However, upon close inspection the two versions differ substantially. The original settlement allowed SBC/ASI to provide voice service "over the bandwidth on the DSL line ... subscribed to or paid for by the ISP." It was not clear that this language was referring to anything other than the customary sharing of voice and data services on a DSL line. The Revised Settlement contains broader language that allows packetized voice "on the ISP's end user line," and does not specify whether this service would be on the portion of the bandwidth paid for by the ISP or not. Although SBC/ASI attempt to clarify this broad language in their comments to say they will not use the portion of the line paid for by the ISP, this is not what a plain reading of the Revised Settlement

leads the reader to believe. As stated in the draft decision, and affirmed by the comments, there are numerous unresolved issues surrounding the provision of packetized voice, or VoDSL, such as the extent to which VoDSL would travel on “unused bandwidth,” use an ISP’s modem, or degrade the service quality of the ISP’s DSL line. As Raw Bandwidth points out, the Commission is also considering issues relating to line sharing and the interplay of voice service and DSL by competing carriers in other currently pending proceedings.¹⁹ It would be unwise to have the settlement predetermine an outcome on any aspect of this service until more is understood about how VoDSL technology interplays with and affects wholesale DSL Transport services to independent ISPs. We agree with all the commenters, including SBC/ASI, who urge that the Commission defer consideration of how to regulate voice over packet technology and avoid locking in any arrangements with this settlement. Therefore, text has been added to the order to clarify that the modification to remove the exception for packetized voice should not be construed to reach a conclusion on whether SBC can offer packetized voice service over an ISP end user’s line. In other words, the modification does not foreclose SBC offering VoDSL service, either on its own or after further application to the Commission, whichever is appropriate, nor does it foreclose future complaints by DSL Transport customers.

The other comments filed by Raw Bandwidth and Brand X merely reargued positions from their prior filings that have already been addressed. There are no changes to the draft order in response to these comments.

¹⁹ See the Permanent Line Sharing Phase of Rulemaking 93-04-003/Investigation 93-04-002 (“OANAD”) and Case 02-11-011, *Telscape Communications, Inc. v. Pacific Bell Telephone Company*.

VI. Categorization and Assignment of Proceeding

This is an adjudicatory proceeding. Loretta M. Lynch is the Assigned Commissioner and ALJ Dorothy Duda is the presiding officer.

Findings of Fact

1. On July 26, 2001, CISPA filed a complaint alleging unlawful discrimination by the Defendants in the provision of DSL Transport services.
2. On March 28, 2002, the Assigned Commissioner and ALJ issued a ruling finding that DSL Transport can involve intrastate applications and that the Commission has concurrent jurisdiction with the FCC over this service.
3. The Settling Parties filed a Revised Settlement on February 10, 2003.
4. Rule 51.1(e) requires that a settlement be reasonable in light of the whole record, consistent with law, and in the public interest.
5. The Revised Settlement contains provisions which:
 - a. Improve customer migration intervals by the end of 2003
 - b. Improve ordering interfaces for ISPs
 - c. Require the consent of ISPs prior to network architecture changes
 - d. Monitor standards for marketing scripts
 - e. Protect end-user information through system security enhancements
 - f. Create an ombudsperson to resolve sales practice and billing disputes with ISPs
 - g. Provide for third party review of SBC/ASI processes and procedures associated with access and use of ISP customer information
 - h. Grandfather certain service options
 - i. Create a marketing fund for the benefit of CISPA ISP members
 - j. Address price and terms for modem kits
6. The Release of Claims language in the Revised Settlement applies only to the signatories of the Settlement.

Conclusions of Law

1. Section 253(b) of the Act does not affect the ability of the state to impose requirements to safeguard the rights of consumers, and Section 414 of the Act is a savings clause that allows states to enforce their own laws as to activities involving interstate communications.

2. The Revised Settlement is reasonable in light of the whole record because it addresses several of the allegations contained in the initial complaint and provides remedies related to the alleged anticompetitive and discriminatory practices of SBC/ASI.

3. The Revised Settlement is consistent with law, as long as it is modified as shown in Appendix A to this order, because it does not unreasonably restrict CISPAs' involvement in other Commission proceedings.

4. The Revised Settlement does not restrict the ability of third parties that are not signatories to the settlement, including CISPAs members, from pursuing their own independent claims.

5. It is inappropriate for SBC/ASI to insert language regarding packetized voice and VoDSL issues into the Revised Settlement without the ability of the Commission to examine and understand the ramifications of these technical issues.

6. It is not in the public interest for the Revised Settlement to preclude CISPAs' involvement in complaint proceedings or lawsuits against Defendants with regard to activities that may have been described in the scoping memo of this proceeding, but occur in the future.

7. It is reasonable to limit the release of future claims by CISPAs and Defendants to the facts described in the scoping memo that are alleged to have occurred between the date when ASI received operating authority from the

Commission in D.00-05-021, or May 4, 2000, and the date of the Initial Settlement, or August 12, 2002.

8. The Revised Settlement is in the public interest, if it is modified as shown in Appendix A to 1) remove language regarding packetized voice, 2) specify an explicit time frame regarding the release of claims, and 3) incorporate the revisions proposed by SBC/ASI on March 10, 2003.

9. The Revised Settlement, if modified as set forth in Appendix A, is in the public interest because it resolves the majority of the issues raised in the underlying complaint and improves upon various aspects of the provisioning of DSL Transport service to ISPs, without the need for extensive litigation.

10. The Revised Settlement, if modified as set forth in Appendix A, does not reach a conclusion on whether SBC/ASI can offer packetized voice service over an ISP end user's line or whether SBC/ASI must obtain ISP approval to use any portion of the line not paid for by the ISP.

11. It is not reasonable to require the complainant to litigate the entire case to determine whether the Revised Settlement is in the public interest.

12. There are no material facts requiring hearings in this matter.

O R D E R

IT IS ORDERED that:

1. The Revised Settlement, filed on February 10, 2003 by the California Internet Service Provider Association, Pacific Bell Telephone Company, and SBC Advanced Solutions Inc. (the "Settling Parties") is approved, and Case 01-07-027 is dismissed with prejudice, if the Settling Parties execute a modified settlement as shown in Appendix A of this order, and file it within 10 days of the effective date of this order.

2. If the Settling Parties do not file a modified settlement as set forth in Ordering Paragraph 1 within 10 days of this order, the Revised Settlement is rejected.

3. If the Revised Settlement is rejected, the Presiding Officer shall set a schedule for hearings on the original complaint and shall convene a prehearing conference to determine which issues should be examined at hearing and whether any additional issues, such as but not limited to the provision of packetized voice over Digital Subscriber Line, should be included within the scope of the case.

4. The March 28, 2002 Ruling Denying Defendants' Motion to Dismiss is affirmed.

5. This proceeding shall remain open to allow further hearings in the event the settlement is rejected.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

APPENDIX B